Supreme Court, U.S.
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87-112

No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

UNITED BROTHERHOOD OF CARPENTERS AND JOINTERS OF AMERICA, AFL-CIO LOCAL 2247, and TRUSTEES FOR THE ALASKA CARPENTERS HEALTH AND SECURITY FUND, RETIREMENT FUND, AND APPRENTICESHIP AND TRAINING FUND,

Petitioner,

vs.

ENDICOTT ENTERPRISES INC.

Respondent.

****

ON WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

****

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QUESTIONS PRESENTED FOR REVIEW

I. Whether an 8(f) pre-hire labor agreement can be repudiated solely by conduct inconsistent with the terms of the agreement.

II. Whether the NLRB has primary jurisdiction to determine repudiation of an 8(f) prehire labor agreement.

III. Whether repudiation of an 8(f) labor agreement by open and notorious conduct inconsistent with the terms of the agreement voids enforceability of the employee trust fund provisions of the agreement ab initio.

CERTIFICATION OF ALL PARTIES TO THE PROCEEDING

The undersigned, counsel of record for Appellants, certifies that the following lists are all parties who have an interest in the outcome of this case. These representations are made to enable the Justices of the Court to evaluate possible disqualification or recusal. The trustees of the Alaska Carpenters Employee Benefit Trust Fund are listed as follows:

1. George Easely
2. Patrick J. Stewart
3. Clyde W. Geraghty
4. William Schneider
5. Edward Purkowski
6. Jim Brannon
7. Doug McElroy
8. Bob Rasmusson

The principals of Endicott Enterprises, Inc. are:

1. Warren Endicott
2. Marian Endicott

DATED at Anchorage, Alaska this 15th day of June, 1987.

JERMAIN, DUNNAGAN &

Randall G. Simpson

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987, No. _____

UNITED BROTHERHOOD OF CARPENTERS AND JOINTERS OF AMERICA, AFL-CIO LOCAL 2247, and TRUSTEES FOR THE ALASKA CARPENTERS HEALTH AND SECURITY FUND, RETIREMENT FUND, AND APPRENTICESHIP AND TRAINING FUND,

Petitioner,

vs.

ENDICOTT ENTERPRISES, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Trustees for the Alaska Carpenters Health & Security Fund, Retirement Fund, and Apprenticeship and Training Fund, the Petitioner herein, pray that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals entered in the above-entitled cause on December 19, 1986.

OPINIONS BELOW

The Opinion of the Ninth Circuit United States Court of Appeals is reported at 806 F.2d 918, (9th Cir. 1986) and is printed in Appendix A, infra, p. 21, A & B. The judgment and memorandum decision of the U.S. District Court, District of Alaska is printed in Appendix C, infra, p. 23. The entry of the judgment of the United States District Court, District of Alaska is printed in Appendix D, infra, p. 24.

JURISDICTION

The judgment of the Ninth Circuit United States Court of Appeals (Appendix A, infra, p. 21 A & B) was entered on December 19, 1986. A timely petition for rehearing to the Ninth Circuit was denied on March 25, 1987 (Appendix B, infra, p.22). The jurisdiction of the Supreme Court is invoked pursuant to 28 Sec. 1254(1).

STATUTES INVOLVED

1. Sec. 8(f) National Labor Relations Act, 73 S. 525, 545, 29 USC Sec. 158(f).

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provision of section 159 of this title prior to the making of such agreement, or (2) such agreement

requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, Tht nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: Provided further, That any agreement which

would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

STATEMENT OF CASE

During late 1981 and early 1982, Endicott Enterprises Inc. (hereinafter Employer) which operates a combined retail sporting goods and hardware store made plans for the construction of a major addition to the old Ace Hardware building in Juneau, Alaska. The construction project was to commence during the summer of 1982 and Employer decided to act as its own general contractor for the reconstruction. The Employer is an Alaska corporation, organized under the laws of the State of Alaska. Warren Endicott is its president and 50% shareholder, while his wife Marian Endicott is vice-president, secretary, treasurer and 50% shareholder.

In April, 1982, Albert Stotz, a carpenter, friend and house guest of the Endicotts did some demolition work and some shelving work on the Ace Hardware Store. Mr. Stotz performed this work for the Endicotts

without payment. After performing this work, Mr. Endicott spoke to Mr. Stotz of his plans for construction of a new building at the site of the old Ace Hardware store. Mr. Stotz made it clear that he would only be willing to work on the construction project if it were a union job. Mr. Endicott assured Mr. Stotz that when financing was obtained, a labor agreement would be signed.

Subsequently, Mr. Stotz contacted Waino Korpela, business agent for the Alaska Carpenters Local 2247 (hereinafter Union) in Juneau, who told Mr. Stotz to bring Mr. Endicott into the union office to make the necessary arrangements. In May 1982 Warren Endicott met with Waino Korpela. They discussed those aspects of labor agreement involving payment of fringe benefits on his employees. At that meeting, Mr. Endicott indicated to Mr. Korpela that he was willing to sign the agreement with the Union. On May 12, 1982 Marian Endicott completed and signed a

"compliance agreement" to the industry-wide Alaska General Contractors Master Labor Agreement obligating Endicott Enterprises to the labor agreement. It was a standard compliance agreement rather than a single-site agreement. Mr. Korpela gave the Endicotts a copy of the labor agreement incorporated by the compliance agreement.

On May 12, 1982 Al Stotz began working for Endicott Enterprises on a garage at the Endicotts' Lemon Creek home. He worked only until May 25, 1982 when he broke his foot falling from the garage roof. For this period of employment, the Employer submitted remittance reports on Mr. Stotz as its sole employee and paid all fringe benefits payable under the labor agreement.

Construction work on the Ace Hardware Store project began in August 1982, at which time the old building was torn down and the excavation was partially completed. The initial phase of construction work involved

demolition and excavation work followed by a second phase of foundation work and framing. It was not until the second phase of the project, sometime in September and October 1982, that W. C. Construction Company began to employ carpenters at the Ace Hardware site using approximately four employees. This work performed by W. C. Construction Company was as a sub-contractor to Employer pursuant to a written proposal at a fixed price.

Throughout the period from August 1982 to January 1983, the Employer submitted monthly remittance reports to the Alaska Carpenters Health and Welfare and Pension Trust Funds (hereinafter Trust Funds). The Employer sent these remittance reports to the Trust Funds with varying notations regarding the status of its work force. The first report received after Mr. Stotz' injury listed Albert Stotz as the only employee but added the words "no longer works here" to the form. On the August 1982 report, the Employer added the

notation "none" under the column for employee names. In September 1982 the remittance report of Endicott Enterprises was received by the Trust Funds with a notation "N/A" in large letters. For October 1982 the remittance report from Endicott Enterprises indicated "no employment." For November 1982 the Employer's remittance reports stated more specifically that: "No workers -- Mr. Stotz no longer works for us." The December 1982 remittance report contained the statement: "We no longer have any union carpenters, thank you."

The crew of W. C. Construction performed all construction work including carpentry work, on the Ace Hardware building. Even though there were employees of W.C. Construction who admittedly performed carpentry work, they were not listed by Employer on its remittance report filed with the Trust Funds nor were benefits paid on their behalf. The labor agreement executed by the Employer required that it ensure that all subcontractors

were signatory or assume liability to pay all employee fringe benefit contributions of its sub-contractors who were not signatory to the labor agreement.

On July 1, 1982, Leroy Peck replaced Waino Korpela as business agent for the union. Mr. Peck received copies of the Employer's remittance reports filed with the Trust Funds' office in Anchorage. Copies of these forms were sent by the Trust Funds to the Union along with forms submitted by all participating employers in the Trust Funds. These reports to the Trust Funds are received generally after a two month lag.

Mr. Peck approached Warren Endicott in January 1983 regarding the status of the Employer's labor agreement. In response to Mr. Peck's inquiry as to whether Endicott Enterprises was "willing to go union on the job," Mr. Endicott replied that "[h}e was thinking about it; which way he was going to go." The men agreed to meet again in a couple

weeks. At the next meeting, Mr. Endicott simply informed Mr. Peck that the price of union carpenters was too high and that he was not going along with the union at that point.

In the latter part of January 1983, the Union decided to picket the Employer. The letters on the picket sign read: "Endicott Enterprises has breached its agreement with Carpenters Local 2247." The same picket signs were carried by members of the Electricians, Laborers and Painters.

Mr. Endicott refused to meet with Mr. Peck and the Union's attorney on February 26, 1983. The Union and the Trust Funds brought this action in the United States District Court, District of Alaska, pursuant to Section 301, Labor Management Relations Act (hereinafter LMRA), 29 USC, Section 185, to collect wages and employee fringe benefits due and owing by the Employer on the hardware construction project. Upon cross-motion for summary judgment, the U.S. District Court,

Judge James A. von der Heydt presiding, entered an order denying the summary judgment of the Union and Trust Funds and granting the motion of the Employer. Judgment was entered dismissing the case and awarding full attorney fees to the Employer. (Appendix infra, p. 34.)

On appeal to the Ninth Circuit, the Ninth Circuit Court of Appeals determined (1) that the primary jurisdiction of NLRB did not dislodge jurisdiction of the Federal District Court to determine questions of past majority status and repudiation of an 8(f) agreement; (2) that the actual notice provided to the Union by the non-union members working on the Ace Hardward project constituted open and notorious conduct sufficient to repudiate the 8(f) agreement executed by Employer and (3) that an award of attorney fees to Endicott was an abuse of the U.S. District Court's discretion. (Appendix infra, p. 11).

REASON FOR GRANTING WRIT

I.

REPUDIATION BY CONDUCT ISSUE

A. There Exists a Split of Authority on Whether an 8(f) Agreement May be Repudiated by Conduct.

Subsequent to the decision of the United States Supreme Court in McNeff v. Todd, 461 U.S. 260, 75 L.Ed.2d 830, 102 S. Ct. 1753 (1983), the issue of in what manner an 8(f) pre-hire agreement may be repudiated has been an open question. In holding that an action under Sec. 301 of the Labor Management Relations Act (hereinafter LMRA) may be brought to recover employee fringe benefit contributions from an employer at any time prior to repudiation of an 8(f) pre-hire agreement, the court stated in a footnote that:

> It is not necessary to decide in this case what specific acts would affect the repudiation of a prehire agreement -- sending notice to the union, engaging activity overtly and completely

> inconsistent with contractual obligations or as respondent suggests, precipitating a representational election pursuant to the final provisions in Sec. 8 that shows the union does not enjoy majority support.

Id. at 839, n. 11.

Several federal district courts have addressed the issue of repudiation of pre-hire agreements by conduct, and the majority indicate that mere non-compliance with contractual obligations is insufficient to constitute repudiation. See, Chicago District Council of Carpenters Pension Fund v. Skreede, 542 F. Supp. 634, 638 (N.D. Ill. 1982); Chicago District Council of Carpenters Pension Fund v. Yonan, 553 F. Supp. 653, 657-558 (N.D. Ill. 1982); Trustees of Atlanta Ironworkers Local 387 Pension Fund v. Southern Stress Wire Corp., 509 F. Supp. 1097, 1105-06 (N.D. Ga. 1981). Other courts have found that written notice was unnecessary when looking at the particular facts and circumstances of each case to

determine whether repudiation has been sufficiently communicated to a union or pension fund. Suburban Teamsters of Northern Illinois, Health & Welfare and Pension Fund v. Callaghan Paving, Inc. et al., 583 F. Supp. 105 (N.D. Ill. 1984); Cable Railing Construction Company v. International Association of Bridge, Structural & Ornamental Ironworkers, 543 F. Supp. 405 (W.D. Pa. 1982). These court decisions note that "[a]bsent an express direction as to what actions constitute repudiation. . .", the courts will treat each case on its particular facts and circumstances. Suburban Teamsters of Northern Illinois Health & Welfare Pension Fund v. Callaghan Paving, supra. The federal courts have yet to develop a bright line as to what conduct, if any, is sufficient to effect repudiation.

B. Ninth Circuit Decisions Are in Conflict With Recent Ruling of NLRB on Repudiation of 8(f) Agreements.

The Ninth Circuit in the case at bar,

and in Carpenters Southern California Administrative Corporation v. J.L.M. Construction Company, Inc., 809 F.2d 495 (9th Cir. 1987) have decided respectively that either actual notice or even constructive notice of open and notorious acts in derogation of the 8(f) labor agreement would constitute sufficient notice of repudiation.

The Eighth Circuit is the only other circuit court to find that "open and notorious acts. . . which are inconsistent with the conditions of the contract would. . . constitute sufficient notice of repudiation." Contractors Health & Welfare Plan v. Harkins Construction & Equipment Company, 733 F.2d 1321, 1326 (8th Cir. 1984). However, even in Harkins, the court remanded to the trial court to have the issue determined whether claimed conduct was sufficiently open and notorious to put the union and its members on notice of repudiation prior to written notice. Id. at 1327.

Subsequent in time to all of the above decisions, the NLRB in Deklewa, et al., and International Association of Bridge Structural and Ornamental Ironworkers, Local 3, AFL-CIO, 82 NLRB No. 184 (February 20, 1987) ruled that an attempt by an employer to repudiate a voluntarily executed 8(f) pre-hire agreement, even without a showing of majority status, would constitute an unfair labor practice. This determination by the NLRB leads to the incongruous and illogical result that the Employer in the case at bar not only breached the promises set forth in its labor agreement with the Union, but also committed unfair labor practices in so doing, and the Ninth Circuit by its decisions sanctions these breaches of agreement and unfair labor practices by calling the conduct "notice" to the Union that the contract is voided.

The Employer in the case at bar took no affirmative steps to put the Union on notice. The Employer did not bother to write a

letter to the Union that it intended to repudiate and void the contract. The Employer merely sat back and took a "wait and see" position and when approached by union officers equivocated and stated he might still honor the labor agreement. All notices to the Trust Fund were similarly deceiving. It was not until late in the construction project, after several contacts with union officers that the Employer finally unequivocally stated that the price of union carpenters was too high and he wasn't going to go along with the Carpenters Union.

C. The Conduct Inconsistent With Terms of the 8(f) Agreement Was Conduct Expressly Provided For in the Agreement.

Even assuming there was actual knowledge of the presence of W. C. Construction, a non-signatory sub-contractor with non-union employees performing carpentry work on the job site and "within spitting distance of the union local", the labor agreement executed by Employer and the Union

specifically contemplated the possiblity that Employer might engage a non-union sub-contractor on his construction job. The agreement of the parties in that instance was that the Employer would either insure that the non-union sub-contractor became signatory or would take the responsibility and liability for payment of all wages and fringe benefit contributions required by the labor agreement.

Under principles enunciated by the United States Supreme Court in Walsh v. Schlecht, 429 U.S. 401 (1977), the general contractor was found obligated to make fringe benefit contributions for hours worked by its non-union employees working for a non-union signatory sub-contractor. The Ninth Circuit in adopting the rule of repudiation by conduct in United Brotherhood of Carpenters & Jointers of America et al. v. Endicott Enterprises, Inc., supra, vitiates the obligation of the general contractor to pay for non-union employees of non-union signatory sub-contractors. To hold

that the mere use of the non-union employees by the non-union signatory sub-contractors repudiates the agreement, totally abrogates Endicott's agreement pursuant to the union sub-contractor clause.

II.

THE NLRB PRIMARY JURISDICTION ISSUE

A. As the Ninth Circuit Noted in its Opinion, the Federal District Court as a Prequisite to Allowing the Defense of Repudiation by Conduct, Determined as a Matter of Law There was a Lack of Majority Support in the Context of the Construction Work Done on the Ace Hardware Store.

The Ninth Circuit has approved the invasion by the federal district into the primary jurisdiction of NLRB to determine majority support of the Union. It justifies this act by stating the the district court was only looking at "past representational status issues." See Endicott decision, p. 7. Petitioner submits that this tortured analysis frustrates the policy and well settled law that

a lack of majority status defense may not be asserted by an employer in its defense to Sec. 301 lawsuits. See, Glazier & Glass Workers, Local Union 67 v. Custom Auto Glass Distributors, 689 F.2d 1339, 1345 (9th Cir. 1982).

By enacting Section 8(f), Congress intended that pre-hire agreements would provide an alternative means by which unions in the construction industry would obtain a status of exclusive representation. By invasion of the NLRB's role to determine union support and representational status, the Ninth Circuit is allowing the employer to execute an 8(f) agreement and sit back, wait and see whether the union will establish majority support and then subsequently raise the defense of lack of majority support of 8(f) agreement as a basis for avoiding the terms of that agreement.

As this Court stated in NLRB v. Ironworkers, 434 U.S. 335 (1978) (Higdon) the justification for availability of pre-hire

agreements in construction industry are two-fold. Pre-hire agreements permit employers to know their labor costs before bidding on a job. Second, employers must have a readily available supply of craftsmen for quick referral. In this context, ". . . [r]epresentation elections in a large segment of the [construction] industry are not feasible to demonstrate majority status. . . due to short periods of actual employment by specific employers." Id. at 349, quoting S. Rep. No. 187, 86th Cong. 1st Sess. 55 (1959), U.S. Code Cong. & Admin. News 1959, pp. 2318, 2373.

By allowing the Employer to raise the issue of lack of union majority support as a defense to a Sec. 301 lawsuit and void the enforceability of that pre-hire agreement from the first date that non-union employees are allowed on the construction project, the court undercuts the congressional determination to allow pre-hire agreements in the construction industry regardless of union majority support.

As argued by Judge Wiggins in his dissent in Endicott, the process of determining what conduct is "mere" breaches of a pre-hire agreement from conduct which is "inconsistent with the continuance" of the agreement injects uncertainty into this area of labor law. See, Endicott 808 F.2d 708, 710. (dissenting opinion of J. Wiggins).

The Ninth Circuit in the case at bar has fashioned a repudiation by conduct rule which uses the very flexibility provided by Congress in the allowance of pre-hire agreements and their full enforceability without majority support to be raised by the employer as basis for avoiding the terms of the agreement. Whether this is a "past" inspection of majority support as opposed to a "present" inspection of majority support, the evil to be avoided is the same. The efficacy and enforceability of 8(f) pre-hire agreements, specifically approved by Congress, has been compromised. Again, as observed by Judge

Wiggins, "The parties in the course of their dealings are left to speculate as to the agreement's viability after each particular breach." Id.

The perfidy of the rule adopted by the Ninth Circuit is put in bold relief by the recent decision of the NLRB in Deklewa et al. and International Association of Bridge, Structural & Ornamental Ironworkers, Local 3, AFL-CIO, 282 NLRB No. 184 (Feb. 20, 1987). There, the Board specifically ruled that an employer who attempted to repudiate an 8(f) agreement had committed an unfair labor practice. The employer's remedy, if it questions union support, is to seek a representational election. However, as a result of the Ninth Circuit's willingness to allow federal courts to investigate "past" majority support of an 8(f) agreement an employer need not seek a representational determination and would be well advised to sit and wait on an 8(f) agreement, employ some non-

union help as evidence of repudiation while the construction work is ongoing and merely wait for a Section 301 lawsuit to be filed to raise the defense of lack of union majority support and repudiation of the 8(f) agreement. This not implausible scenario demonstrates how the Ninth Circuit distinction of "past" versus "present" representation issues encourages employer duplicity.

III.

REPUDIATION BY CONDUCT TO AVOID AN 8(f) AGREEMENT AB INITIO

In the case at bar the federal district court failed to make a determination at what point in time repudiation by conduct constituted notice to avoid the 8(f) agreement. The court determined only that repudiation by conduct had occurred and that the 8(f) agreement was voided. However, it is only logical that repudiation by conduct, if it occurs at all, cannot work to void an 8(f)

agreement ab initio. This point is demonstrated by the decision of the D.C. Circuit Court in Washington Area Carpenters Welfare Fund v. Overhead Door, 681 F.2d 1, 9 (38 D.C. Cir. 1982). The court found that the conduct in derogation of the agreement must operate for a sufficient period of time in order ". . . that the union and employees be put on notice that the contract is voided." Again, as Judge Wiggins stated in his dissenting opinion to Endicott, that although the union may have had clear notice of Endicott's non-compliance with the agreement, it does not necessarily follow that the union had notice of Endicott's intent to repudiate. United Brotherhood of Carpenters et al. v. Endicott Enterprises, 808 F.2d 708, 710 (9th Cir. 1986). Under the facts demonstrating Employer equivocation and the fact of non-payment of benefits after commencement of the job, the rule adopted by majority permits retroactive repudiation. Petitioner agrees

with Judge Wiggins that such result ". . . makes little sense." Id.

The Ninth Circuit's decision in Endicott overlooked this problem by finding that the federal district court could reasonably find that the enforceability of 8(f) agreement provisions were repudiated by the Employer's conduct. This decision ignores the well settled law that 8(f) agreements continue to have legal effect and can be enforced by Section 301 lawsuit prior to repudiation. As the United States Supreme Court stated in McNeff v. Todd, 461 U.S. 260, 269 (1983), a lawsuit under Section 301 of the LMRA may be brought to recover employee fringe benefit contributions from an employer at any time prior to actual repudiation of the 8(f) pre-hire agreement, even though majority status had not yet been attained. In the case at bar, the Ninth Circuit has given greater effect to Employer's repudiation by conduct which avoids the provisions of the 8(f) agreement in total,

whereas a representational election or a letter of repudiation mailed to the Union by the Employer would only have voided the provisions of the 8(f) agreement from the date of the election or date of the letter respectively.

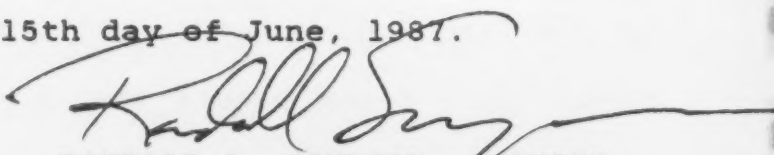
None of the cases relied on by the Ninth Circuit in its decision in Endicott stand for the proposition that open and notorious conduct in derogation of an 8(f) agreement acts to put the union on notice to the repudiation of the labor agreement from the first day, first hour, first minute that a non-union employee works on a construction site. To so hold would totally undercut and devalue the use of 8(f) pre-hire agreement in the construction industry, a practice which has specifically been addressed and approved by Congress.

CONCLUSION

Petitioner respectfully submits that this case raises substantial questions of federal law concerning the validity, enforceability and continued efficacy of 8(f)

pre-hire agreements necessary to unions, employee benefit trust funds, and employers in the construction industry. Moreover, there is clearly demonstrated confusion in the federal courts and conflict with decisions of the NLRB over the manner, timing and propriety of repudiation of 8(f) agreements. Therefore, Petitioner respectfully prays for grant of writ of certiorari.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 15th day of June, 1987.



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CERTIFICATE

I hereby certify that I prepared this brief in accordance with the Federal Rules of Appellate Procedure and the Rules of the U.S. Supreme Court so far as the rules are available and known to me.

JERMAIN, DUNNAGAN & OWENS, P.C.

Randall G. Simpson

CERTIFICATE OF SERVICE

I hereby certify that three copies of Petition for Writ of Certiorari have been furnished by mail to John Clough, III, 302 Gold Street, Juneau, Alaska 99801, Attorney for Appellees, on the 15 day of June, 1987.

Randall G. Simpson

A P P E N D I X

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED BROTHERHOOD OF CARPENTERS AND JOINTERS OF AMERICA, AFL-CIO LOCAL 2247, and TRUSTEES FOR THE ALASKA CARPENTERS HEALTH AND SECURITY FUND, RETIREMENT FUND, AND APPRENTICESHIP AND TRAINING FUND,

Plaintiffs-Appellants,

v.

ENDICOTT ENTERPRISES, INC.,

Defendant-Appellee.

No. 85-3865

D.C. No. J 83-005

OPINION

Argued and Submitted
September 2, 1986—Anchorage, Alaska

Filed December 19, 1986

Before: Joseph T. Sneed, Anthony M. Kennedy and Charles Wiggins, Circuit Judges.

Opinion by Judge Sneed

Appeal from the United States District Court
for the District of Alaska
James A. Von Der Heydt, District Judge, Presiding

SUMMARY

Labor/Attorneys' Fees

Appeal from grant of summary judgment and award of attorneys' fees. Affirmed in part and reversed in part.

Appellee Endicott, a husband and wife corporation, planned a major addition to its Hardware building. Mr. Endicott approached Stotz, a friend, about working on the project. Stotz was willing to work on the project only if it were a union job. As a result, the Endicotts entered into a compliance agreement with the union. Stotz was injured while working on an unrelated job for the Endicotts. Work was commenced on the project without the use of any union employees. The construction site was located very close to union headquarters and the union's business agent knew from the outset that carpentry work was being done by non-union employees. After the business agent met with Mr. Endicott and determined that union workers were not going to be used, the union brought suit against Endicott to recover unpaid contributions for employees of Endicott and for the employees of the non-union construction company performing carpentry work on the construction site. The trial court granted summary judgment in favor of Endicott, finding that, even if there was a valid prehire agreement, Endicott repudiated the agreement by conduct. The court also awarded attorneys' fees in favor of Endicott.

[1] Prehire agreements are allowed for under the National Labor Relations Act for employers and unions in the construction industry. [2] Such agreements are voidable at either party's option until the union receives majority support of the workers at the employer's construction site. [3] The union argues that the question of whether the union achieved majority status at the construction site is a question for the National Labor Relations Board. [4] This court rejects the union's argument; the doctrine of primary jurisdiction does not apply in determining a union's past representational status. In light of the undisputed fact that no union employee ever worked on the construction site, the district court's finding that the union never achieved majority status is correct.

[5] An employer may repudiate a prehire agreement by conduct. [6] Here, Endicott did not comply with a single term of

the prehire agreement at the construction site at any time. [7] Moreover, it is undisputed that the union had actual notice of the open and notorious acts on the part of Endicott.

[8] This court reverses the award of attorneys' fees, however, because the lawsuit concerned a relatively unsettled area of the law.

COUNSEL

Jermain, Dunnagan & Owens, Randall Simpson, Anchorage, Alaska, for the plaintiffs-appellants.

John F. Clough, III, Juneau, Alaska, for the defendant-appellee.

OPINION

SNEED, Circuit Judge:

United Brotherhood of Carpenters and Jointers of America, AFL-CIO Local 2247 (Union) appeals from a summary judgment granted in favor of Endicott Enterprises, Inc. (Endicott). The district court found that Endicott had effectively repudiated a section 8(f) prehire agreement with the Union, and thus was not liable to the Union for benefits due under the prehire agreement. The Union also appeals an award of full attorneys' fees to Endicott. We hold that summary judgment was proper but the award of attorneys' fees was an abuse of discretion; therefore, we affirm in part and reverse in part.

I.

FACTS AND PROCEEDINGS BELOW

During late 1981 and early 1982, Endicott—a husband and wife corporation, with Warren and Marian Endicott each

owning 50% of the stock—planned to construct a major addition to its ACE Hardware building in Juneau, Alaska. In April, 1982, Albert Stotz, a friend of the Endicotts, did some demolition and shelving work on the hardware store; he did not accept payment for this work. Mr. Endicott approached Stotz about working on the proposed construction project, and Stotz said that he would do the work only if the job were a union job.

Stotz contacted Waino Korpela, the business agent for the Union. In May, 1982, Warren Endicott met with Korpela. After discussing the payment of fringe benefits, Mr. Endicott indicated that he was willing to sign an agreement with the Union. On May 12, 1982, Marian Endicott signed a compliance agreement with the Union. Korpela gave Mr. Endicott a copy of the master labor agreement incorporated by the compliance agreement. At the time the Endicotts entered into the compliance agreement, Stotz began working for them by doing construction work on their garage. He worked from May 12, 1982 to May 25, 1982, on which day he was injured. During this time, Endicott filed the appropriate reports with the Union and paid Stotz's benefits.

In August, 1982, workers began the demolition part of the addition project at the ACE Hardware store, which was located very close to Union headquarters. In October, 1982, carpentry work commenced on the addition. This work was performed entirely by non-union carpenters hired by Endicott from W.C. Construction Co. LeRoy Peck, who replaced Waino Korpela as the Union's business agent on July 1, 1982, testified that from the very beginning of the project he knew that carpentry work was being done on a non-union basis. Excerpt of Record (E.R.) at 264, 266-67. The crew worked from October, 1982 to December, 1982.

Endicott continued to file remittance reports with the Union during the period from August, 1982, to January 19, 1983. These reports first listed Stotz as the only union

employee and shortly thereafter listed no union employees. Endicott never listed the non-union construction workers on the remittance forms. According to the Union's Trust Funds Division, there is a two-month lag between the time an employer files the remittance forms with the Trust Funds Division and the Union's receipt of those forms.

Peck contacted Warren Endicott in January, 1983 to find out whether Endicott "was going to go union on the job." Mr. Endicott responded that he was not sure. Two weeks later they met again and Endicott said that he was not going to use Union workers. In late January, 1983, the Union decided to picket Endicott, claiming a breach of the master labor agreement.

The Union sued under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for unpaid contributions for employees of Endicott and for the employees of the non-union construction company performing carpentry work on the ACE Hardware store.[1] After hearing cross-motions for summary judgment, the district court denied the Union's motion and granted Endicott's. The court declined to decide the issue of whether Endicott intended to sign a prehire agreement,[2] and refused to grant summary judgment on that issue because the facts were disputed. In granting summary judgment for Endicott the district court held that even if the contract between the parties were a prehire agreement, Endi-

[1]W.C. Construction Co. performed the work as a subcontractor to Endicott pursuant to a written proposal at a fixed price. The master labor agreement between Endicott and the Union required that Endicott be responsible for paying all employee fringe benefit contributions of its subcontractors who had not signed a labor agreement. E.R. at 312.

[2]If the parties did not intend to enter into a prehire agreement, then the Union would have no claim for payment of benefits. Because the district court found the question of whether there was a prehire agreement to be a disputed fact question and this issue has not been raised on appeal, we assume the existence of a valid prehire agreement and decide whether Endicott effectively repudiated this agreement.

cott repudiated the agreement by conduct. E.R. at 471. The court also granted full attorneys' fees to Endicott. The Union appeals, and Endicott seeks attorneys' fees on appeal.

The Union attacks the jurisdiction of the district court on the grounds that the National Labor Relations Board (NLRB) must determine whether the Union lacked majority status before the district court can confront the repudiation issue. Next it asserts that, in any event, there was no repudiation of the prehire agreement, and, finally, that the award of attorneys' fees to Endicott was an abuse of the district court's discretion. We shall address each of these contentions separately.

II.

THE JURISDICTIONAL ISSUE

A. *Prehire Agreement*

[1] Section 8(f) of the National Labor Relations Act, 73 Stat. 525, 545, 29 U.S.C. § 158(f), creates an exception in the construction industry to the general policy prohibiting binding collective bargaining agreements between employers and employee bargaining units that have not received majority support. Section 8(f) allows employers and unions in the construction industry to enter into "prehire" agreements that are generally signed before the hiring of employees and, therefore, before any showing of union majority support. *See Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266 (1983); *John S. Griffith Constr. Co. v. United Bhd. of Carpenters Local 563*, 785 F.2d 706, 707 (9th Cir. 1986).

[2] Prehire agreements enable employees in the construction business, in which employment is generally transitory, to obtain some of the benefits of union representation before the union obtains majority support. *See Todd v. Jim McNeff, Inc.*, 667 F.2d 800, 802 (9th Cir. 1982), *aff'd*, 461 U.S. 260 (1983).

These agreements also assure the employer of a supply of skilled labor ready for quick referral, protection against labor unrest during the period of the contract, and predictable labor costs, an important tool in the bidding process. *Id.* A prehire agreement is voidable at either party's option until the union receives majority support of the workers at the employer's construction site, at which time it matures into a fully binding collective bargaining agreement. *See, e.g., Griffith Constr. Co.*, 785 F.2d at 709.

B. *NLRB's Jurisdiction*

The primary issue in this case is whether Endicott effectively repudiated its prehire agreement with the Union. As a prerequisite to a resolution of this issue, however, it was necessary for the district court to find that the Union did not achieve majority status at the ACE Hardware construction site. The court so found and stated that "[n]o union employee ever worked on the hardware store job, although it may have been the Endicott's [sic] intent to hire Stotz for that job." E.R. at 471.

[3] The Union challenges the power of the district court to make a finding on majority status by raising the issue of primary jurisdiction. The principle invoked is that "the NLRB has the initial responsibility of deciding issues involving [union] representation." *Griffith Constr. Co.*, 785 F.2d at 709. The Union thus asserts that the district court could not have decided the repudiation question without an NLRB determination that the Union lacked majority status.

[4] We reject the Union's argument because the doctrine of primary jurisdiction does not apply in determining a union's *past* representational status. This court in *Todd v. Jim McNeff, Inc.*, 667 F.2d at 804, stated:

> The [NLRB] has expertise in determining the majority status of a union at any given time. It has no

> apparatus for determining a union's past status. If there has been a repudiation, the crucial question is whether the union had previously attained majority status. Recreation of past relationships for the purpose of resolving factual disputes is one of the traditional functions of a trial court, and not a process in which the NLRB has any extraordinary expertise. Therefore, in this opinion we do not extend the District Court's jurisdiction into an area in which the NLRB exercises exclusive authority.

Although we have previously referred to the above-quoted language as dicta, *see Griffith Constr. Co.*, 785 F.2d at 709 n.2, we see no reason now to depart from it. This lawsuit arose after the completion of the hardware store job; therefore, only the past representational status of the Union was at issue. The district court had jurisdiction to address the majority status issue. In light of the fact that both parties agree that no union employee ever worked on the hardware store job, the district court's finding that the Union never achieved majority status was correct.

III.

THE REPUDIATION ISSUE

On the basis of this finding, the district court turned to the repudiation issue. It entered a summary judgment for Endicott on the ground that its non-compliance with the terms of the prehire agreement was so bald and open as to put the Union on notice of its intent to repudiate.

A. *Standard of Review*

The standard of review applicable to the grant of summary judgment has been stated many times. It is whether "there is any genuine issue as to any material fact and, if not, whether viewing the evidence and inferences which may be drawn

therefrom in the light most favorable to the adverse party, the movant is entitled to prevail as a matter of law." *Operating Eng'rs Pension Trust v. Beck Eng'g & Surveying Co.*, 746 F.2d 557, 561 (9th Cir. 1984). That is, we review the grant of summary judgment de novo. *American Metal Products, Inc. v. Sheet Metal Workers Int'l Ass'n Local 104*, 794 F.2d 1452, 1454 (9th Cir. 1986).

B. *Repudiation by Conduct*

Either party, to repeat, has the right to repudiate its agreement before the union obtains majority support in the relevant unit. *Jim McNeff, Inc. v. Todd*, 461 U.S. at 270. However, the United States Supreme Court has declined to decide what specific acts would constitute repudiation. *Id.* at 270-71 n.11. This circuit, while also refraining from delineating a test for repudiation by conduct,[3] has stated that "in some circumstances noncompliance can be so bald as to put the union on notice of the employer's intent to repudiate." *Todd v. Jim McNeff, Inc.*, 667 F.2d at 804.

[5] The Eighth Circuit, after reviewing the previous cases addressing the issue of repudiation of prehire agreements by conduct, concluded that an employer may repudiate such an agreement by conduct. *Contractors Health & Welfare Plan v. Harkins Constr. & Equipment Co.*, 733 F.2d 1321, 1326 (8th Cir. 1984). The *Harkins* court stated:

> In order to constitute a repudiation, the conduct must be sufficient to put the union and the employ-

[3]This court in *Operating Engineers Pension Trust v. Beck Engineering and Surveying Co.*, 746 F.2d 557, 566 (9th Cir. 1984), held that "a construction industry employer who employs a single employee pursuant to a Section 8(f) pre-hire agreement is entitled to repudiate the agreement by conduct sufficient to put the union and the employee on notice that the agreement has been terminated." The court refused to adopt a general rule relating to the conduct required to manifest an intent to void a prehire agreement outside of the single employee context. *Id.* at 565.

> ees on notice that the agreement is terminated [citation omitted]. Whether sufficient notice of termination has been given raises a question of fact that requires an examination of the conduct of all parties. [citation omitted]. Where the prehire contract itself, as in this case, contains no provision for a formal notice of termination, open and notorious acts by one party, known to the other, which are inconsistent with the continuance of the contract would, in our view, constitute sufficient notice of repudiation. A mere breach of contract ordinarily would not suffice to establish repudiation.

733 F.2d at 1326. *See also Washington Area Carpenters' Welfare Fund v. Overhead Door Co.*, 681 F.2d 1, 9 n.38 (D.C. Cir. 1982) ("The essential point is that the union and employees be put on notice that the contract is voided."), *cert. denied*, 461 U.S. 926 (1983).

[6] The Union argues that the district court erred in finding Endicott's actions sufficiently bald and open to give the Union notice of Endicott's intent to repudiate. We disagree. Other than Mr. Stotz, who never actually performed any work at the Ace Hardware construction site, no Union workers ever worked on the job. The Endicotts hired a non-union contractor and used non-union employees who were not paid union-scale wages and did not receive union benefits. Endicott did not comply with a single term of the prehire agreement at the Ace Hardware site at any time. This was not the case of an equivocal minor breach of a prehire agreement. Here Mr. Endicott's actions, which were affirmed by his words in January, 1983, were totally inconsistent with the existence of such an agreement.

[7] Moreover, it is undisputed that the Union had actual notice of the open and notorious acts on the part of Endicott. The Ace Hardware job site was located only 100 to 150 yards away from the Union hall, so close "you could spit over

there," according to Mr. Stotz. E.R. at 372. Mr. Peck, the business agent for the Union, observed the carpentry work and the absence of any Union employees at the construction site just by walking past the area. The fact that Endicott was performing the job on a non-union basis from the outset was the subject of discussion at Union meetings. Significantly, the Union itself did not comply with terms of the prehire agreement such as informing Endicott of the names of its stewards. In short, from the outset of the project neither party treated the prehire agreement as if it were still in effect. Under these circumstances we hold that a trier of fact could not reasonably find that there had been no repudiation. We therefore affirm the district court's order granting judgment in favor of Endicott.

IV.

THE ATTORNEYS' FEES ISSUE

The district court awarded full attorneys' fees to Endicott, finding that the Union's claim was "frivolous, unreasonable, and without foundation." E.R. at 518. It is within the discretion of the district court to award attorneys' fees to employers that successfully defend ERISA trust fund collection actions. *Carpenters S. Cal. Admin. Corp. v. Russell*, 726 F.2d 1410, 1415 (9th Cir. 1984). An award of fees will be reversed only for an abuse of discretion. *Id.*

This court has indicated the factors that a district court should consider when deciding whether to award attorneys' fees. These factors are:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting in similar circumstances; (4) whether the parties requesting fees sought to benefit all participants

> and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Id.; *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980). The above listed factors frequently lead to the conclusion that attorneys' fees should not be charged against ERISA plaintiffs. *See Russell*, 726 F.2d at 1416. *See also Marquardt v. North Am. Car Corp.*, 652 F.2d 715 (7th Cir. 1981) (explaining why application of the *Hummel* guidelines suggests that trustees of benefit plans are more likely than employers to recover attorneys' fees).

[8] We believe, after considering the factors listed in *Hummel*, that the district court abused its discretion in awarding attorneys' fees to Endicott. After the United States Supreme Court decision in *Jim McNeff, Inc. v. Todd*, the issue of what acts constitute repudiation of a prehire agreement has been an open question. Although it is clear, in our opinion, that Endicott effectively repudiated its prehire agreement by its conduct, there is no evidence that the Union pursued its claim in bad faith. The Union owed a fiduciary duty to preserve benefits for all employees covered by the prehire agreement. Because this lawsuit involves a relatively unsettled area of the law, we cannot find that the Union's suit was the kind of vexatious litigation meant to be deterred by the imposition of attorneys' fees.

In its order awarding attorneys' fees, the district court stated that the facts of this case were nearly identical to those of *Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984). However, that case turned on a lack of intent to contract. *Id.* at 1505. The district court here specifically refused to decide whether Endicott intended to sign a prehire agreement. The reasoning in *Gilliam* is not controlling here. We find that the district court abused its discretion and reverse the award of attorneys' fees. For the same reasons as discussed above we also decline to award attorneys' fees to

Endicott on appeal.

AFFIRMED IN PART, REVERSED IN PART.

Judge Wiggins may file a separate statement at a later date.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO LOCAL 2247, and TRUSTEES FOR THE ALASKA CARPENTERS HEALTH AND SECURITY FUND, RETIREMENT FUND, and APPRENTICESHIP AND TRAINING FUND,	)	No. 85-3865
Plaintiffs-Appellants,	)	DISSENTING OPINION
v.	)	
ENDICOTT ENTERPRISES, INC.,	)	
Defendant-Appellee.	)	

Argued and Submitted
September 2, 1986 - Anchorage, Alaska

Filed January 26, 1987

Before: Joseph T. Sneed, Anthony M. Kennedy and Charles Wiggins, Circuit Judges.

Dissenting Opinion by Judge Wiggins

Appeal from the United States District Court for the District of Alaska

James A. Von Der Heydt, District Judge,

Jermain, Dunnagan & Owens, Randall Simpson, Anchorage, Alaska, for the plaintiffs-appellants.

John F. Clough, III, Juneau, Alaska, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge, dissenting:

I cannot agree with the majority's holding - the first in this circuit - that an employer may repudiate a "pre-hire" labor agreement [1] merely by acting inconsistently with the terms of the agreement. Because this rule will create great uncertainty as to if and when an employer has repudiated a pre-hire agreement, I respectfully dissent.

The majority opinion, 806 F.2d 918 (9th Cir. 1986), provides both a detailed factual background of the case and an overview of the law regarding pre-hire agreements and I do not duplicate its efforts. Endicott Enterprises, Inc. (Endicott) and United Brotherhood of Carpenters and Joiners of America (Union) entered into a statewide labor agreement. The agreement in part provided

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1/ By the term "pre-hire agreement" I mean those construction industry labor agreements permitted by 29 U.S.C. §158(f).

that Endicott pay employee fringe benefit contributions to the Union for carpentry work performed for Endicott by subcontractors who were not signatories to a collective bargaining agreement with the Union. In this action the Union seeks employee fringe benefit contributions for non-Union carpentry work performed for Endicott at its Ace Hardware Store site commencing in October 1982.

The majority holds, as a matter of law, that Endicott's actions were "sufficiently bald and open to give the Union notice of Endicott's intent to repudiate." Id. at 922. To support its decision the majority lists the following facts: (1) no Union members worked at the Ace Hardware site; (2) Endicott, in violation of the agreement, made no employee fringe benefit contributions for the non-Union carpentry work; (3) the Union knew that Endicott was employing non-Union workers at the site; (4) "the Union itself

did not comply with terms of the agreement such as informing Endicott of the names of its steward"; and (5) Warren Endicott verbally informed the Union in late January 1983 that Endicott would not employ Union workers on the job. Id. at 922-23.

Implicit in the majority's decision to deny the Union any employee fringe benefit compensation for the Ace Hardward job is the majority's belief that Endicott repudiated before or at the commencement of the job in October 1982. Mr. Endicott's late January 1983 oral statement to the Union that Endicott would not employ Union workers is therefore irrelevant to the majority's holding, because it in no way reflects on the notice provided the Union in October 1982.2/

The majority also finds significant that the Union itself violated certain terms of

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2/ This is not to say that Mr. Endicott's statement is irrelevant to Endicott's repudiation in January 1983. I address this below.

the agreement, including the duty to provide Endicott the names of its stewards. But even if a material breach by the Union would excuse Endicott's obligations under the agreement, see NLRB v. Pacific Erectors, Inc., 718 F.2d 1459, 1464 (9th Cir. 1983), these minor breaches are not material.

This leaves what I see to be the actual basis for the majority's decision: its belief that Endicott's "bald and open" hiring of exclusively non-Union workers without making the required employee benefit contributions to the Union gave the Union sufficient notice of Endicott's intent to repudiate. The majority thus established that repudiation of pre-hire agreements need not be effected by an express statement indicating an intention not to be bound by the pre-hire agreement, but rather may be inferred from the repudiating party's conduct.

The majority bases its rule permitting repudiation by conduct on dictum in this

court's decision in Todd v. Jim McNeff, Inc., 667 F.2d 800, 804 (9th Cir.1982), aff'd, 461 U.S. 260, 103 S.Ct. 1753, 75 L.Ed.2d 830 (1983), that "in some circumstances non-compliance can be so bald as to put the union on notice of the employer's intent to repudiate." The Supreme Court, in affirming our decision, however, specifically declined to state what acts (including those "overtly and completely inconsistent with contractual obligations") would suffice to repudiate a pre-hire agreement, 641 U.S. at 270 n. 11, 103 S.Ct. at 1759 n.11, and we have subsequently recognized the noncontrolling nature of the Todd dictum, see Roberts v. Ayala, 709 F.2d 520,521 n. 1 (9th Cir.1983). Proceeding from this weak precedential base the majority adopts the holding of Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Harkins Construction & Equipment Co., 733 F.2d 1321, 1326 (8th Cir.1984), that "open and notorious acts by one party, known to the

other, which are inconsistent with the continuance of the contract" constitute sufficient repudiation, while "[a] mere breach of contract ordinarily will not suffice to establish repudiation."

This rule permitting repudiation of pre-hire agreements by conduct is ill-advised. Distinguishing between "mere" breaches of a pre-hire agreement and actions "inconsistent with the continuance" of the agreement injects unnecessary uncertainty into this area of labor law. Almost certainly litigation over this issue will ensue for years in this court, leaving many parties to pre-hire agreements unsure of their status under those agreement. For example, many actions "inconsistent with the continuance" of pre-hire agreements are not instantaneous events, but rather occur over time. Under the rule the majority adopts a court with perfect hindsight might conclude that the totality of an employer's breaches

constituted repudiation, but would be left with the difficult question of precisely when the repudiation occurred. The parties in the course of their dealings are left to speculate as to the agreement's viability after each particular breach.

Some of the difficulties of a ruling permitting repudiation by conduct are illustrated by this case.[3] Applying the Harkins Construction test is by no means easy. While I agree with the majority that the Union had clear notice of Endicott's noncompliance with the agreement, this does not mean that the Union had clear notice of Endicott's intent to repudiate the agreement. The majority believes that

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3/ I use the facts of this case to show that any rule permitting repudiation merely on the basis of the repudiating party's conduct is ill-advised; I do not mean to indicate that here Endicott's conduct was insufficiently "open and notorious" while in other cases an employer's conduct may be.

Endicott manifested its intent to repudiate the agreement in October 1982. The record, however, reveals that Mr. Endicott himself was not sure even in late January 1983 whether Endicott "was going to the union on the job." 806 F.2d at 920. Moreover, the majority, by considering Endicott's non-payment of employee fringe benefits after the commencement of the job (at which time, the majority holds, Endicott repudiated), in effect permits retroactive repudiation. This makes little sense.

I would have more sympathy for a rule permitting repudiation by conduct if the uncertainty that the rule created were counterbalanced by the promotion of some federal labor policy. The employer, however, reaps the benefit of the agreement's assurance of a steady supply of skilled labor, protection against labor unrest, and predictable labor costs. Todd, 667 F.2d at 802. It does not seem to me unfair to hold

the employer to the terms of the agreement, which the employer bargained for, until the employer expressly repudiates.

While I reject the majority's finding of repudiation by conduct, I do believe that Mr. Endicott's undisputed late January 1983 oral statement to the Union, as a matter of law, establishes Endicott's repudiation of the pre-hire agreement. Parties may orally restrict the application of written labor agreements to particular bargaining units, Operating Eng'rs Pension Trst v. Beck Eng'g & Surveying Co., 746 F.2d 557, 568 (9th Cir.1984), and other circuits have permitted express oral repudiation of pre-hire agreements, see New Mexico Dist. Council of Carpenters & Joiners v. Jordan & Nobles Constr. Co., 802 F.2d 1253, 1256 (10th Cir.1986); Painters Local Union No. 164 v. Epley, 764 F.2d 1509 (11th Cir.1985), cert. denied, ____ U.S. ____, 106 S.Ct. 1636, 90 L.Ed.2d 182(1986); International Ass'n of

Bridge, Structural & Ornamental Iron Workers, Local union No. 103 v. Higdon Constr. Co., 739 F.2d 280 (7th Cir.1984). Mr. Endicott's statement that Endicott would not employ Union workers at the Ace Hardware site, although evidently devoid of terms such as "repudiate" or "terminate," provided the Union with fair notice of Endicott's intent not to be found by the agreement. It therefore constitutes repudiation.

A rule requiring express repudiation by statement provides the parties to a pre-hire agreement greater certainty of their status under the agreement than does a rule permitting repudiation by conduct alone. Leaving a party to infer intent to repudiate from another party's conduct invites confusion; requiring the repudiating party to state to the other its intent to repudiate significantly reduces this conclusion, while imposing only a minor burden on the repudiating party. Moreover, because statements, unlike many actions, are discrete

events, they permit the court and the parties to set with greater certainty the precise moment of repudiation.4/

Because the record does not support a finding of Endicott's repudiation until late January 1983, the foundation for the district court's denial of relief to the Union for employee fringe benefit payments until that time is undermined, as is its award of attorneys' fees to Endicott. I dissent on this basis.

As a postscript I note that the result of this case could have been quite different. Although, for reasons unknown to me, the Union did not raise the issue, the agreement itself apparently expressly

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4/ By proposing a rule requiring express repudiation by statement I do not suggest that parties' conduct is entirely irrelevant to the repudiation issue. If litigants dispute the occurrence of a statement, for instance, their conduct may be probative of the statement's occurrence.

provides that written notice of termination must be given for the termination to be effective.[5] It is established law that where labor agreements provide for a formal notice of termination attempts at termination through other means are ineffective. See Irwin v. Carpenters Health & Welfare Trust Fund, 745 F.2d 553, 556 (9th Cir.1984) ("Where such clear and specific language [regarding written termination] in a labor agreement is at issue, federal courts are uniform in their strict interpretation of such language.");[6] NLRB v. R.J. Smith

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5/ The "Compliance Agreement Section" provides: "This Agreement is effective through June 30, 1984 and shall continue thereafter from year to year, unless either party delivers to the other party a written notice of termination of at least sixty (60) days prior to the anniversary of the above termination." Excerpt of Record at 407.

6/ Carpenters Southern California Adimistrative Corp. v. Russell, 726 F.2d 1410 (9th Cir.1984), is not to the contrary. There this court held the employer's six-year absence from the industry sufficed to terminate a prehire agreement otherwise terminable only in

(footnote continued on next page)

Constr. Co., 545 F.2d 187, 192 (D.C. Cir.1976). Even Harkins Construction, which the majority cites to establish a rule permitting repudiation by conduct, explicitly recognized that conduct alone could not constitute repudiation where the parties have agreed otherwise. 733 F.2d at 1326 ("Where the prehire contract itself . . . contains no provision for a formal notice of termination, open and notorious acts by one party, known to the other, which are inconsistent with the continuance of the contract would, in our view, constitute sufficient notice of repudiation."); accord Local 257, Int'l Bhd. of Elec. Workers v. Grimm, 786 F.2d 342, 346 (8th Cir.1986).

Were I writing the opinion of the court

(Footnote continued from previous page)

writing. The court relied upon the "unusual" circumstances of the case. Id. at 1414. Whatever the validity of the Carpenters decision after our decision in Irwin, Carpenter's "unusual" circumstances distinguish it from the present case.

I would be loath to decide for the Union on the basis of an argument to which Endicott was given no opportunity to respond. The majority understandably does not consider the agreement's express termination provision. Therefore, its holding permitting repudiation of pre-hire agreements by conduct should be limited to those agreements containing no provisions for formal notice of termination.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO LOCAL 2247, and TRUSTEES FOR THE ALASKA CARPENTERS HEALTH AND SECURITY FUND, RETIREMENT FUND, AND APPRENTICESHIP AND TRAINING FUND,	)	
Plaintiffs-Appellants,	)	No. 85-3865
v.	)	
ENDICOTT ENTERPRISES, INC.,	)	DC# J 83-005
Defendant-Appellee.	)	ORDER

Before: SNEED, KENNEDY, and WIGGINS, Circuit Judges.

Appellants' petition for rehearing is denied.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, Local 2247 and TRUSTEES FOR THE ALASKA CARPENTERS HEALTH AND SECURITY FUND, RETIREMENT FUND, AND APPRENTICESHIP AND TRAINING FUND,	)
Plaintiffs,	)
vs.	)
ENDICOTT ENTERPRISES, INC.,	)
Defendants.	)

J83-005 CIV

MEMORANDUM AND ORDER

THIS CAUSE comes before the court on the parties' cross motions for summary judgment. In its motion defendant raises two arguments why the contract between it and the Carpenters' Local 2247 (Union) is not enforceable. Plaintiffs contend the contract is valid and, defendant having raised no good defense against it, that enforcement is required.

Defendant first argues that no

contract was formed for the reason that it intended to insure Mr. Stolz only and did not intend to sign a pre-hire agreement. See Operating Engineers Pension Trust v. Gilliam, slip. op. (9th Cir. July 19, 1984); Caporale v. Mar Les, Inc., 656 F.2d 242 (7th Cir. 1981). The court agrees with defendant that these cases are on point. However, in both those actions the contract was declared void only after a hearing to resolve factual disputes. Given that factual disputes exist in this case regarding the intent of the Endicotts, summary judgment cannot be granted.

Second, defendant argues that even if the contract was a pre-hire agreement it repudiated the contract by conduct. Since there are no disputed material facts regarding this argument, the court finds summary judgment is appropriate.

Initially, under the facts of this case, the 8(f) pre-hire agreement, see 29 U.S.C. Sec. 158(f), never matured into a binding section 9(a) exclusive representation

agreement. See 29 U.S.C. Sec. 159(a). But only one union employee ever worked for Endicott Enterprises, Stolz, and he worked only on the garage job. No union employee ever worked on the hardware store job, although it may have been the Endicotts' intent to hire Stolz for that job. Further, Stolz only worked for two weeks prior to injuring himself. The garage job was in May. The hardware store job occurred several months later and at a totally different location.

There must be a permanent and stable unit of employees, the majority of whom are union members, before an 8(f) agreement will convert into a 9(a) agreement. If there is no stable workforce, but there is hiring on a job-by-job basis, the employer's duty to honor the contract is contingent on the union attaining majority support at the various construction sites. See NLRB v. Pacific Erectors, Inc., 718 F.2d 1459, 1463 (9th Cir. 1983); Construction Erectors, Inc. v. NLRB, 661 F.2d 801, 803-04 (9th Cir. 1981). As a matter of law, the union

here never established a majority at the hardware store construction site for the reason that there never was majority union support of a permanent and stable workforce.

Section 8(f) agreements can be freely repudiated by an employer at any time. See, e.g., Construction Erectors, Inc. 661 F.2d at 803. Although repudiation is normally by written notice, non-compliance can be so bold as to put the union on notice of the employer's intent to repudiate. Todd v. Jim McNeff, Inc., 667 F.2d 800, 804 (9th Cir. 1982), aff'd on other grounds, 103 S. Ct. 1753 (1983). The record is clear that defendant's actions put the union on notice of its intent to repudiate. The non-compliance was bold and open, and unlike in Todd, defendant had no ulterior motives or intent to deceive the union. The record is equally clear that the union was always aware of defendant's non-compliance with the contract. Therefore, the court finds that summary judgment is appropriate in defendant's favor on the issue of contract repudiation.

Accordingly, IT IS ORDERED:

(1) THAT Plaintiffs' motion for summary judgment is denied;

(2) THAT defendant's motion for summary judgment is granted;

(3) THAT defendant's counterclaims remaining unresolved, no judgment shall be entered at this time; and

(4) THAT defendant advise the court within 20 days of the date of this order if it is its intent to pursue its counterclaims, or if such can be dismissed, final judgment entered and the case closed.

DATED at Anchorage, Alaska this 26th day of March, 1985.

/s/ James A. von der Heydt
United States District Judge

cc: Gregory C. Taylor
John F. Clough, III

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, Local 2247 and TRUSTEES FOR THE ALASKA CARPENTERS HEALTH AND SECURITY FUND, RETIREMENT FUND, AND APPRENTICESHIP AND TRAINING FUND,	)
Plaintiffs,	)
vs.	)
ENDICOTT ENTERPRISES, INC.,	) FINAL JUDGMENT
Defendant.	)

J83-005 CIV

The above matter having come before the court upon cross motions for summary judgment, and the court having filed its memorandum and order dated March 26, 1985,

IT IS ORDERED AND ADJUDGED:

1. That final judgment is entered for the defendant and against the plaintiffs, and plaintiffs' complaint is dismissed with prejudice.

2. That defendant's counterclaims

are dismissed.

DATED at Anchorage, Alaska this 17th day of April, 1985.

/s/ James A. von der Heydt
United States District Judge

cc: Gregory C. Taylor
John F. Clough, III